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## Americans and the Quest for an Ethical International Law

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## AMERICANS AND THE QUEST FOR AN ETHICAL INTERNATIONAL LAW\*

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*Mark Weston Janis\*\**

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### I. THE CHALLENGE

Foreign critics sometimes accuse Americans of taking a hypocritical stance on international law. They say we preach an ethical international law to others, but practice a selfishly utilitarian international law ourselves. Here is the remarkable opinion, given just last year, of a leading European international lawyer. Martti Koskenniemi, a distinguished Finnish scholar, is Professor of International Law at the University of Helsinki and a Global Professor of Law at New York University. Koskenniemi believes that the Europeans speak “the language of universal international law,” but:

How differently the Americans see the world! Legalization, is just a policy choice, a matter of costs and benefits – with no *a priori* reason to believe that the latter would outweigh the former. And no real obligation to obey international law, just a weak maxim of prudence. The international law professor is an almost extinct species at United States law schools. And why not? In his widely read pamphlet, Robert D. Kaplan called for leadership with a pagan ethos. “The moral basis of our foreign policy will depend upon the character of our nation and its lead-

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ers, not upon the absolutes of international law.” *Nur der, der Kann, darf auch* wrote Erich Kaufmann in 1911 from within another Empire. U.S. attitudes to law read like the imperial authoritarianism of early twentieth-century Germany.<sup>1</sup>

Less vehement, but equally challenging, is this opinion, also within the last year, of Alfred van Staden, the accomplished Dutch scholar and Professor of International Relations at Leiden University:

One of the core elements in the fashionable criticism of contemporary American foreign policy is the putative lack of commitment by the US administration to the tenets of international law. [C]ritics tirelessly point to the long list of treaties the US has rejected in spite of the overwhelming support from other countries: the Statute of the International Criminal Court, the Landmines Treaty, the Comprehensive Nuclear Test Ban Treaty, the Kyoto Protocol, the Biological Diversity Treaty, the Law of the Sea Treaty, and the proposed Protocol to the Biological Weapons Convention. In addition to the abrogation of the ABM Treaty, for a long time widely regarded as a showpiece of classical bilateral arms control, the US is blamed for having undermined a series of multilateral treaties. Cited examples are its use of reservations to the Civil and Political Rights Covenant and the Race Convention (to ensure that no change in US law and practice would be required), its enactment of implementing legislation for the Chemical Weapons Convention (aimed at limitations on verifications efforts by the OPCW), and its failure to comply with its obligations under Article VI of the NPT to pursue nuclear disarmament. On top of that, the decision of the Bush administration in March 2003 to resort to military force, without explicit authorization of the UN Security Council, against the regime of Saddam Hussein was castigated by many commentators as an unjustified blow to the effectiveness of the UN Charter.

The contention has been made that the prevailing American approach to international law is such that it defines this *corpus* of law basically in terms of private contractual relationships. International law is not seen as a value in its own right that is conducive to transforming the international system from relatively anarchical patterns of state interactions to a society of nations (or even a global society) unified by common bonds.

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<sup>1</sup> Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 117-18 (2005) (citations omitted).

Rather, it is perceived as a vehicle to serve national policy goals.<sup>2</sup>

This lecture is a response to answer such foreign critiques. My thesis is that Americans have long been inclined to both morality and utility in international law and that both inclinations are equally genuine. We are not inherently hypocritical. The truth is more complex. Americans hold and promote both moral and practical values, albeit we sometimes delude ourselves that what is useful in international law is good, and what is good in international law is useful.

A preliminary observation. An easy way to begin to understand the American stance on international law is to observe that all of us do not hold the same position respecting the discipline. We Americans have many different views. In large measure, our mixed international law position is the result not of hypocrisy but of cacophony. There are, for example, the practicing lawyers acquainted with the international law of treaties and custom, available as rules of decision in state and federal courts. There is our government and its diplomats, who represent the international legal positions of the United States in our foreign relations. There are the scholars and jurists, like myself, who read about and attempt to influence legal precedent and doctrine. And, there are the utopians, those who wish to employ international law to fashion a better world.

In what follows, I turn to over two hundred years of American involvement with international law. My focus is on our quest for an ethical international law. I draw upon some of the work already published in the first volume of my intellectual history of American international law -- *The American Tradition of International Law: Great Expectations 1789-1914*<sup>3</sup> -- and add some new thoughts from a work in progress, a second volume of *The American Tradition* devoted to the period after 1914. In response to the challenge posed by our European friends, I emphasize five important American contributions to an ethical, rather than a strictly utilitarian, international law: (1) James Kent and the ethics of the efficacy of international law; (2) David Low Dodge, Noah Worcester, and William Ladd and the ideal of an international court; (3) Elihu Burritt and the origins of the international peace movement; and (4) Woodrow Wilson and the fight for the League of Nations.

## II. JAMES KENT AND THE ETHICS OF THE EFFICACY OF INTERNATIONAL LAW

In the early decades of the New Republic, when lawyers commanded the heights of America's political and intellectual terrain, no jurist was more generally revered than James Kent (1763-1847), Chancellor of the State of New

<sup>2</sup> Alfred van Staden, 52 NETH. INT'L L. REV. 501 (2005) (reviewing J.F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (2004)).

<sup>3</sup> MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789-1914* (2004) [hereinafter JANIS, *GREAT EXPECTATIONS*].

York and Professor of Law at Columbia.<sup>4</sup> Kent's lasting contribution to the United States was a monumental four volume work based on his law school lectures, *Commentaries on American Law* (1826-1830), the first great American law treatise. Like the *Commentaries on the Laws of England* (1765-1769) of William Blackstone (1723-1780),<sup>5</sup> Kent's *Commentaries* ordered the chaos of judge-made law and gave common lawyers an intellectual and professional discipline rigorous enough to meet the tests of a new age. Kent's *Commentaries*, often revised, remained a staple in the educational diet of American lawyers well into the nineteenth century.<sup>6</sup>

It was of no small moment then that Kent in his rendering of American law gave international law pride of place. Kent's *Commentaries* began with 200 pages devoted to the law of nations.<sup>7</sup> His first volume commenced with an inaugural paragraph which reverentially intertwined international law, a term first introduced in a 1789 publication by Jeremy Bentham,<sup>8</sup> with the American Revolution. Kent defined and praised the discipline, and presciently remarked on imperfections that would engage American international lawyers for years to come:

When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law. During the war of the American revolution, Congress claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law, "according to the general usages of Europe." By this law

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<sup>4</sup> PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 109-10, 145-46 (1965).

<sup>5</sup> WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769* (Univ. of Chicago Press ed., 1979).

<sup>6</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 290 (1st ed. 1974).

<sup>7</sup> 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 1-200 (New York, Halsted 2d ed.) (1832) [hereinafter KENT, *AMERICAN LAW*]. Kent's importance, at least with respect to international law, was by no means limited to the United States. In 1866, John Thomas Abdy, an English barrister and Cambridge Professor of Laws, revised Kent's 200 pages about international law for a separate English edition and assented to the assessment of Kent "as the greatest jurist whom this age has produced, whose writings may safely be said to be never wrong." J. T. Abdy, Preface to Kent's *Commentary on International Law*, at vi (J.T. Abdy ed., 1st ed. 1866). Abdy's Kent went into a second and revised English edition twelve years later. KENT'S *COMMENTARY ON INTERNATIONAL LAW* (J.T. Abdy ed., 2d ed. 1878).

<sup>8</sup> "International law" as a term first appeared in Bentham's Introduction to the Principles of Morals and Legislation and was not originally synonymous with the traditional notion of the law of nations. M. W. Janis, *Jeremy Bentham and the Fashioning of 'International Law,'* 78 AM. J. INT'L L. 405 (1984). However, by the early nineteenth century, Americans, like others, were beginning to employ the law of nations and international law interchangeably; Kent was no exception. See, e.g., KENT, *AMERICAN LAW*, *supra* note 7, at 4, 6, 20.

we are to understand that code of public instruction, which defines the rights and prescribes the duties of nations, in their intercourse with each other. The faithful observance of this law is essential to national character, and to the happiness of mankind. According to the observation of Montesquieu, it is founded on the principle, that different nations ought to do each other as much good in peace, and as little harm in war, as possible, without injury to their true interest. But, as the precepts of this code are not defined in every case with perfect precision, and as nations have no common civil tribunal to resort to for the interpretation and execution of this law, it is often very difficult to ascertain, to the satisfaction of the parties concerned, its precise injunctions and extent; and a still greater difficulty is the want of adequate pacific means to secure obedience to its dictates.<sup>9</sup>

The prominence of international law in Kent's *Commentaries* had little or nothing to do with the then already familiar English common law rule that the law of nations was, as Blackstone had put it, "adopted in its full extent by the common law, and is held to be a part of the law of the land."<sup>10</sup> Albeit, at least as early as 1784, American courts recognized the adoption rule,<sup>11</sup> a recognition more or less acknowledged by Kent: "England and the United States have been equally disposed to acknowledge the authority of the works of jurists, writing professedly on public law, and the binding force of the general usage and practice of nations, and the still greater respect due to judicial decisions recognizing and enforcing the law of nations."<sup>12</sup> However, then, as now, the incorporation and application of the law of nations by municipal judges made up only a small fraction of the cases arising before the courts, a relative unimportance reflected by Blackstone who put his principal discussion of the law of nations and the adoption rule deep in his fourth and final volume.<sup>13</sup>

Instead of dealing with the law of nations at the outset as did Kent, Blackstone began his treatise with an "Introduction" which set the common law of England upon "two foundations, the law of nature and the law of revelation",<sup>14</sup> a deification of the English common law that outraged his demystifying

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<sup>9</sup> KENT, *AMERICAN LAW*, supra note 7, at 1-2.

<sup>10</sup> BLACKSTONE, supra note 5, at 67.

<sup>11</sup> See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

<sup>12</sup> KENT, *AMERICAN LAW*, supra note 7, at 19.

<sup>13</sup> BLACKSTONE, supra note 5, at 66-73.

<sup>14</sup> *Id.*; 1 BLACKSTONE, supra note 5, at 42. In Blackstone's "Introduction" the law of nations had only a fleeting appearance as a law regulating the "mutual intercourse" of different societies and depending "entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities." *Id.*

Oxford pupil, Jeremy Bentham.<sup>15</sup> Equally, Kent outraged the Harvard historian, Perry Miller, who complained that Kent made a “fantastic effort” to “translate” the law of nature into the law of nations so as to cover the common law with “the canopy of Christianity.”<sup>16</sup>

Put into perspective, however, Kent’s Christianizing was a form of moralizing, and not at all fantastic. It began early on in his text as Kent explored “a difference of opinion among writers, concerning the foundation of the law of nations.”<sup>17</sup> Kent contrasted the views of positivists who looked to a “system of positive institutions, founded upon consent and usage” for the sources of international law against the views of naturalists who felt that the source of international law “was essentially the same as the law of nature, applied to the conduct of nations, in the character of moral persons, susceptible of obligation and laws.”<sup>18</sup> For himself, Kent adopted a middle position, not unusual among eighteenth and nineteenth century lawyers, called “mixed” or “Grotian,” which incorporated both positivist and natural elements:

We ought not, therefore, to separate the science of public law from that of ethics, nor encourage the dangerous suggestion, that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their own local concerns. States, or bodies politic, are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life.<sup>19</sup>

It was only at this point, after finding worth in both positive and natural sources of international law, that Kent turned to Christianity and morality:

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, the brighter light, the

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<sup>15</sup> J. BENTHAM, *A Comment on the Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 34-37 (Burns & Hart eds., 1977). Bentham had missed the point.

<sup>16</sup> MILLER, *supra* note 4, at 166.

<sup>17</sup> KENT, *AMERICAN LAW*, *supra* note 7, at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2-3.

more certain truths, and the more definite sanction, which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves. They form together a community of nations, united by religion, manners, morals, humanity, and science, and united also by the mutual advantages of commercial intercourse, by the habit of forming alliances and treaties with each other, of interchanging ambassadors, and of studying and recognizing the same writers and systems of public law.<sup>20</sup>

This Christian “community of nations” was a vital element in Kent’s analysis of international law, a law which he was persuaded was only “the off-spring of modern times.”<sup>21</sup> He argued that only in the eleventh century did five institutions – “the feudal system, the concurrence of Europe in one form of religious worship and government, the establishment of chivalry, the negotiations and treaties forming the conventional law of Europe, and the settlement of a scale of political rank and precedence – combine to begin to establish the modern law of nations.”<sup>22</sup> Christianity was the most important:

Of all these causes of reformation, the most weight is to be attributed to the intimate alliance of the great powers as one Christian community. The influence of Christianity was very efficient towards the introduction of a better and more enlightened sense of right and justice among the governments of Europe. It taught the duty of benevolence to strangers, of humanity to the vanquished, of the obligation of good faith, and of the sin of murder, revenge, and rapacity. The history of Europe, during the early periods of modern history, abounds with interesting and strong cases, to show the authority of the church over turbulent princes and fierce warriors, and the effect of that authority in meliorating manners, checking violence, and introducing a system of morals which inculcated peace, moderation and justice.<sup>23</sup>

Though Kent set the heritage of the discipline back into the medieval Catholic “confederacy of the Christian nations” which was “bound together by a sense of common duty and interest in respect to the rest of mankind,”<sup>24</sup> he be-

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<sup>20</sup> *Id.* at 3-4.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 9-10.

<sup>23</sup> *Id.* at 10.

<sup>24</sup> *Id.*



lieved that it was not until the seventeenth century and the Protestant jurist Grotius that international law truly emerged in its modern form:

Thus stood the law of nations at the age of Grotius. It had been rescued, to a very considerable extent, from the cruel usages and practices of the northern barbarians. It had been restored to some degree of science and civility by the influence of Christianity, the study of the Roman law, and the spirit of commerce. It had grown greatly in value and efficacy, from the intimate connexion and constant intercourse of the modern nations of Europe, who were derived from a common origin, and were governed by similar institutions, manners, laws, and religion. But it was still in a state of extreme disorder, and its principles were little known, and less observed. It consisted of a series of undigested precedents, without order or authority. Grotius has, therefore, been justly considered as the father of the law of nations; and he arose like a splendid luminary, dispelling darkness and confusion, and imparting light and security to the intercourse of nations.<sup>25</sup>

A “splendid luminary?” What was it in Grotius that triggered such adulation? In Kent’s day, Grotius’ great treatise of 1625, *The Law of War and Peace*, was no longer the standard text on international law. Vattel’s *The Law of Nations*,<sup>26</sup> published in 1758, had already long displaced Grotius in the public eye.<sup>27</sup> Grotius, reprinted or translated fifty times between 1625 and 1758, was, in the hundred years after 1758, reprinted or translated only twice.<sup>28</sup>

Rather than current notoriety, it seems that what appealed to Kent was what one might call the “Grotian ethic” or perhaps what one might more precisely term “Kent’s restatement of the Grotian ethic.” In his influential *Commentaries*, Kent summarized Grotius’ elaboration of “the reasons which led him

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<sup>25</sup> *Id.* at 15.

<sup>26</sup> EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (G.G. & J. Robinson ed., 1797).

<sup>27</sup> Joseph G. Starke, *The Influence of Grotius Upon the Development of International Law in the Eighteenth Century*, in 2 GROTIAN SOCIETY PAPERS 1972 -- STUDIES IN THE HISTORY OF THE LAW OF NATIONS 162-76, (C.H. Alexandrowicz ed., 1972) [hereinafter Starke].

<sup>28</sup> Francis Steven Ruddy, *The Acceptance of Vattel*, in Starke, *supra* note 27, at 177-79. In his new and revised edition of Vattel in 1834, Joseph Chitty wrote of Vattel’s “pre-eminent importance” and ventured the speculation “that everyone who has attentively read this work, will admit that he has acquired a knowledge of superior sentiments, and more important information, than he ever derived from any other work.” Joseph Chitty, *Introduction to EMMERICH DE VATTEL, THE LAWS OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, at iii (Joseph Chitty ed., 1834).

to undertake his necessary, and most useful, and immortal work.”<sup>29</sup> Grotius, unlike Vattel, had set the central problem of international law in a particularly Christian context. The Grotian ethic was elaborated during the terrible slaughter of the Thirty Years War:

Fully convinced by the considerations which I have advanced, that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.<sup>30</sup>

As Kent described the Grotian ethic:

The object of Grotius was to [show] a community of sentiment among the wise and learned of all nations and ages, in favour of the natural law of morality. He likewise undertook to show that justice was of perpetual obligation, and essential to the well being of every society, and that the great commonwealth of nations stood in need of law, and the observance of faith, and the practice of justice.<sup>31</sup>

Grotius was attractive to Kent, not only because Grotius recognized that there was an inevitable conflict between the awful reality of war and the Christian ideal of universal love and brotherhood, but because he employed what for Americans was an enticing mix of hard-headed positivistic realism and a persuasive naturalistic moralism to reconcile the conflict. Grotius’ reconciliation was based on the notion of sovereign consent to legally binding rules, either explicitly in treaties or implicitly in custom.<sup>32</sup> Grotius’ construction acknowledged the plain reality of the independence of states (and hence the need for state consent), but maintained that states were nevertheless legally and morally obliged by their commitments.

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<sup>29</sup> KENT, *AMERICAN LAW*, *supra* note 7, at 15-16.

<sup>30</sup> HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 20 (Prolegomena Sections 28, 29), in 2 *THE CLASSICS OF INTERNATIONAL LAW* (F. W. Kelsey trans., James B. Scott ed., 1925).

<sup>31</sup> Kent, *American Law*, *supra* note 7, at 15.

<sup>32</sup> MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 4-6, 9-16, 41-44 (4th ed. 2003) [hereinafter Janis, *International Law*].

As an American, Kent was employing Christianity generally and the Grotian ethic particularly to grapple with one of international law's most troublesome open questions, its international efficacy. This was a question not bothering Blackstone, who looked more or less exclusively at the incorporation of the law of nations in the municipal law of England. Kent's description of a Christian community of nations helped him explain why international law actually worked in international practice. It was one thing for an American judge to apply the rules of common law *à la* Blackstone in a domestic court case. It was quite another for international law to be applied in the conduct of international relations. Domestically, the law courts could count upon the ordinary powers of the state to enforce their judgments. Internationally, Kent knew that no executive branch existed to sanction violators of international law. Kent's Christianity was ethically imperative and practically useful.

Like Grotius before him, Kent set the positive substantive rules of international law on a moral procedural foundation. Doing so included an affirmation that the ethics of a Christian community of nations helped enforce the law of nations. Kent believed that the new United States, as part of the Christian community of nations, ought therefore to live up to its moral obligation to respect the international law of that community. It was, I think, just this perception of the ethical efficacy of international law in international relations that led the German scholar, Hans-Ulrich Scupin, to conclude that Kent, an American, was probably the "earliest writer to display the modern approach" to international law.<sup>33</sup>

### III. DAVID LOW DODGE, NOAH WORCESTER, WILLIAM LADD, AND THE IDEAL OF AN INTERNATIONAL COURT

Just as committed as James Kent to an ethical international law, but for another cause, was an influential band of early 19<sup>th</sup> century American advocates of an international court. Nowadays international courts are so much the erudite province of lawyers and judges that it is easy to suppose that it was they who were principally responsible for their creation. However, to a surprising extent, the international courts of today are a product of the work of 19<sup>th</sup> century Americans by and large untrained in the law: David Low Dodge, Noah Worcester, and William Ladd.

These ethical proponents of international courts were initially active between the War of 1812 and the American Civil War. This half century was the period when the particulars of modern international institutions took on concrete form and when the ethical agitation for such a court became quite strong in America. The ideas and enthusiasm then generated for an international court

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<sup>33</sup> Hans-Ulrich Scupin, *History of the Law of Nations 1815 to World War I*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 179, 196 (1984).

were thus already in place when, between 1865 and 1945, the ideal of an international court captured the imagination of those Americans who promoted and helped institute the Permanent Court of Arbitration in 1899, the Permanent Court of Justice in 1920, and the International Court of Justice in 1945.

Some of the earliest texts of the nineteenth century American peace movement were penned by David Low Dodge (1774-1852), a Connecticut Presbyterian become New York merchant whose self study led him to pacifism in 1808. In 1809, Dodge wrote a much-heralded condemnation of war, *The Mediator's Kingdom not of this World but Spiritual, Heavenly, and Divine*. Dodge marshaled economic, political, and humanitarian rationales alongside religious objections to prove that war was wrong and unlawful.<sup>34</sup>

Dodge was a New Englander. This was no coincidence. The 19th century pacifist movement was always stronger in New England than elsewhere in the United States.<sup>35</sup> The pacifism of many New Englanders, especially the conservative Federalists, was reinforced by the War of 1812. The interruption of New England's European commerce and the British attacks on the New England coast led many New Englanders to condemn all wars or at least all aggressive wars.

At the abortive, possibly secessionist, Hartford Convention (December 1814 - January 1815), delegates from Massachusetts, Connecticut, Rhode Island, New Hampshire, and Vermont boldly resolved that "[r]arely can the state of this country call for or justify offensive war." They demanded a constitutional amendment requiring that "Congress shall not make or declare war, or authorize acts of hostility against any foreign nation, without the concurrence of two thirds of both houses, except such acts of hostility be in defence of the territories of the United States when actually invaded."<sup>36</sup>

More extreme still was the rhetoric from some New England pulpits. The Rev. Elijah Parish of Byfield, Massachusetts, urged his congregation to

proclaim an honourable neutrality; let the southern Heroes fight their own battles and guard . . . against the just vengeance of their lacerated slaves . . . Break those chains, under which you have sullenly murmured, during the long, long reign of democracy; . . . and once more breathe that free commercial air of New England which your fathers always enjoyed . . . Protest did I say, protest? Forbid this war to proceed in New England.<sup>37</sup>

<sup>34</sup> PETER BROCK, *PACIFISM IN THE UNITED STATES FROM THE COLONIAL ERA TO THE FIRST WORLD WAR* 450-66 (1968).

<sup>35</sup> *Id.* at 469.

<sup>36</sup> THEODORE DWIGHT, *HISTORY OF THE HARTFORD CONVENTION: WITH A REVIEW OF THE POLICY OF THE UNITED STATES GOVERNMENT, WHICH LED TO THE WAR OF 1812* 351-52, 373, 378 (1833).

<sup>37</sup> See JAMES M. BANNER, JR., *TO THE HARTFORD CONVENTION* 307 (1970).

It should not be surprising, then, that Dodge's most influential book was published in 1814 in the heat of the War of 1812. His *War Inconsistent with the Religion of Jesus Christ* showed seven reasons why war was inhuman, eight why it was unwise, and eleven why it was criminal. Dodge concluded with this call to action:

All who earnestly desire and look for the millennial glory of the church should consider that it can never arrive until the spirit and practice of war are abolished. All who love our Lord Jesus Christ in sincerity cannot but ardently desire that wars may cease to the ends of the earth and that mankind should embrace each other as brethren. If so, is it not their duty to do all in their power to promote so benevolent an object? Ought not every individual Christian to conduct in such a manner that if every other person imitated his example it would be best for the whole? If so, would they not immediately renounce everything that leads to wars and fighting and embrace everything which would promote that glorious reign of righteousness and peace for which they earnestly hope, long, and pray? "The work of righteousness shall be peace, and the effect righteousness, quietness and assurance forever."<sup>38</sup>

Alongside Dodge's evangelistic pacifist works came the efforts of Noah Worcester (1758-1837), a New Hampshire-born Unitarian minister in Massachusetts. Worcester, a veteran of the American Revolutionary War, came only gradually to his anti-war position. It was the War of 1812, Worcester wrote, which was "the occasion of perfecting the revolution in my mind in regard to the lawfulness of war."<sup>39</sup> In 1814, the same year of Dodge's key essay, Worcester published *A Solemn Review of the Custom of War*, which was to become a classic, probably "the most widely distributed of all Peace literature."<sup>40</sup> Worcester later explained that:

I became thoroughly convinced that war is the effect of delusion, totally repugnant to the Christian religion, and wholly unnecessary except as it becomes necessary from delusion and the basest passions of human nature; that when it is waged for a redress of wrongs, its tendency is to multiply wrongs a hundred-

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<sup>38</sup> DAVID LOW DODGE, *WAR INCONSISTENT WITH THE RELIGION OF JESUS CHRIST* 120 (Ginn & Co. ed., 1905).

<sup>39</sup> H. WARE, *MEMOIRS OF THE REV. NOAH WORCESTER, D.D.* 64 (1844) [hereinafter WARE, NOAH WORCESTER].

<sup>40</sup> A.C.F. BEALES, *THE HISTORY OF PEACE: A SHORT ACCOUNT OF THE ORGANIZED MOVEMENTS FOR INTERNATIONAL PEACE* 45 (1931).

fold; and that in principle, the best we can make of it, is doing evil that good may come.<sup>41</sup>

Worcester rejected the notion that God means man to fight and that war is a good way of sending off bad men.<sup>42</sup> In dealing with the contention “that no substitute for war can be devised, which will insure to a nation a redress of wrongs,”<sup>43</sup> he introduced the idea of an international court, albeit without the detail that would follow in the writings of others:

But if the eyes of people could be opened in regard to the evils and delusions of war, would it not be easy to form a confederacy of nations, and organize a high court of equity, to decide national controversies? Why might not such a court be composed of some of the most eminent characters from each nation; and a compliance with the decisions of the court be made a point of national honor, to prevent the effusion of blood, and to preserve the blessings of peace? Can any considerate person say, that the probability of obtaining right in such a court, would be *less* than by an appeal to arms?<sup>44</sup>

Worcester went on to applaud the peaceful tradition of the Quakers and Shakers,<sup>45</sup> to attack the depravity occasioned by war upon armies and general populations,<sup>46</sup> and to show how war was contrary to the spirit and teachings of Christianity.<sup>47</sup> He envisioned peace societies spreading to every Christian nation and serving as vehicles for educating public opinion about the horrors of war.<sup>48</sup> “[L]et lawyers, politicians and divines, and men of every class, who can write or speak, consecrate their talents to the diffusion of light, love and peace.”<sup>49</sup>

When the War of 1812 came to a close in the early months of 1815, the New England Federalists, now seen as unpatriotic, watched their party slide into political oblivion. But the anti-war sentiment of Dodge and Worcester persisted. So did the idea of peace societies. No sooner was the war against England over in 1815 that Dodge in New York, Worcester in Massachusetts, and

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<sup>41</sup> WARE, NOAH WORCESTER, *supra* note 39, at 66-67.

<sup>42</sup> NOAH WORCESTER, A SOLEMN REVIEW OF THE CUSTOM OF WAR, SHOWING THAT WAR IS THE EFFECT OF POPULAR DELUSION AND PROPOSING A REMEDY 5-6 (11th ed. 1833).

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 7-8.

<sup>46</sup> *Id.* at 9-10.

<sup>47</sup> *Id.* at 10-17.

<sup>48</sup> *Id.* at 17-24.

<sup>49</sup> *Id.* at 21.

two Quakers in Ohio independently founded the world's first peace societies.<sup>50</sup> More state peace societies followed in New England in Maine, New Hampshire, Vermont, Rhode Island, and Connecticut, and, further afield, in Pennsylvania, North Carolina, and Georgia.<sup>51</sup>

These post-War of 1812 peace societies were largely middle class. Dodge's New York Peace Society was "eminently respectable, decidedly bourgeois, with its Wall Street brokers, merchants and businessmen, clergymen and philanthropic gentlemen active 'in the most benevolent enterprises of the day.'"<sup>52</sup> Worcester's Massachusetts Peace Society was in its membership even "more august" than New York for it included, in addition to an imposing array of ministers of religion, and substantial Boston merchants, "the names of the governor, the lieutenant governor, two respectable judges, the president and several professors of Harvard University."<sup>53</sup>

In terms of doctrine, the New York society was more absolutist, promoting a thorough-going sort of Christian non-resistant pacifism. Massachusetts, however, influenced by Worcester's gradualism, was more forgiving of the use of force. The Massachusetts Peace Society sought to influence public and governmental opinion by preaching against the immorality, waste, and irreligiosity of war. More than New York, Massachusetts was interested in political alternatives to war. Worcester especially was keen to show that international law and arbitration could serve as a reasonable realistic substitute for war as a means of international dispute settlement.<sup>54</sup>

As the peace societies spread throughout the United States in the 1820's and 1830's, it was the Massachusetts gradualist model that proved the more influential. Membership ranged from radical pacifists to conservative peace enthusiasts. Worcester, who founded and until 1828 edited the popular *Friend of Peace*, rather than Dodge, became the more important figure.<sup>55</sup> Devout and usually prosperous churchmen from the Unitarians, Presbyterians, Congregationalists, Baptists, and Methodists filled peace society ranks. Episcopalians, Roman Catholics and, curiously, Quakers were not so active. The reluctance of Friends to join may well have been due to their disappointment that Worcester's groups refused to condemn all wars.<sup>56</sup>

Already, the peace societies were ideologically split. One of the fundamentally divisive issues was whether there was any obligation to promote

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<sup>50</sup> BROCK, *supra* note 34, at 458-59, 472; BEALES, *supra* note 40, at 45-46. A year later a British peace society was founded by Quakers in London. *Id.* at 46.

<sup>51</sup> James Brown Scott, *Introduction* to WILLIAM LADD, AN ESSAY ON A CONGRESS OF NATIONS FOR THE ADJUSTMENT OF INTERNATIONAL DISPUTES WITHOUT RESORT TO ARMS, at vii (Carnegie ed., Oxford Univ. Press 1916) (1840) [hereinafter Scott].

<sup>52</sup> BROCK, *supra* note 34, at 460.

<sup>53</sup> *Id.* at 472.

<sup>54</sup> *Id.* at 471-73, 459-68.

<sup>55</sup> *Id.* at 474; BEALES, *supra* note 40, at 51-52.

<sup>56</sup> BROCK, *supra* note 34, at 478-79.

alternatives to war. For most of the Dodge-like and Quaker pacifists, a total renunciation of war was intrinsic to the movement. For Worcester and the gradualists, if the movement were to succeed, there needed to be substitutes to war, substitutes that might sometimes require forceful sanctions.<sup>57</sup> Worcester had already hinted at the potential for international arbitration. As the peace societies matured, Worcester's hint was heard, at least in America,<sup>58</sup> and more elaborate schemes for international adjudication followed.

Probably, the key American figure in the early elaboration of the ideal of an international court was William Ladd (1778-1841). Born in Exeter, New Hampshire, and graduated in 1797 from Harvard College, Ladd first followed the sea and then settled down in Maine on his family's prosperous farm. His conversion to the peace movement came in 1819, in part due to a reading of Worcester.<sup>59</sup>

Ladd made two important contributions to the American international court movement. First, in 1828, he consolidated the state peace societies into a national federation, the American Peace Society, of which he served first as executive officer and then its president. Until his death in 1841, Ladd was the leading light of the peace societies, British as well as American.<sup>60</sup> He was instrumental in the publication of the Society's monthly journal, first called the *Harbinger of Peace* in 1828, and later the *Calumet* in 1831, the *American Advocate of Peace* in 1835, and the *Advocate of Peace*, when in 1837, the American Peace Society moved from Hartford to Boston.<sup>61</sup>

Second, in 1840, Ladd published his *Essay on a Congress of Nations*. To some extent at least, Ladd's *Essay* was a consolidation of the efforts of others. Under his direction, the American Peace Society had organized an essay competition on the theme "A Congress of Nations." About forty essays vied for a "reward offered by two gentlemen of New York." Two award committees illustriously composed of United States Supreme Court Justice Joseph Story, Attorney-General William Wirt, South Carolina Senator John C. Calhoun, former President John Quincy Adams, our old friend, New York Chancellor James Kent, and Massachusetts Senator Daniel Webster were unable to decide which should win. It was finally decided to publish the five best essays with Ladd adding "a sixth, taking all the matter from the rejected Essays worth preserv-

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<sup>57</sup> *Id.* at 480-81.

<sup>58</sup> The emphasis on international organization was not at all so pronounced in England. BEALES, *supra* note 40, at 53-54.

<sup>59</sup> SCOTT, *supra* note 51, at iii, v.

<sup>60</sup> BEALES, *supra* note 40, at 52-53.

<sup>61</sup> SCOTT, *supra* note 51, at vii-viii. The name changes continued in the twentieth century; the journal became THE ADVOCATE OF PEACE THROUGH JUSTICE IN 1920 AND WORLD AFFAIRS IN 1932. WORLD AFFAIRS, 95 WORLD AFFAIRS 3 (1932).



ing,” including “such reflections, additions and historical facts as occurred to me during my labor.”<sup>62</sup>

Ladd claimed “originality” on “the thought of separating the subject into two distinct parts:”

1st. A congress of ambassadors from all those Christian and civilized nations who should choose to send them, for the purpose of settling the principles of international law by compact and agreement, of the nature of a mutual treaty, and also by devising and promoting plans for the preservation of peace, and meliorating the condition of man. 2d. A court of nations, composed of the most able civilians in the world, to arbitrate or judge such cases as should be brought before it, by the mutual consent of two or more contending nations: thus dividing entirely the diplomatic from the judicial functions, which require such different, not to say opposite, characters in the exercise of their functions. I consider the Congress as the legislature, and the Court as the judiciary, in the government of nations, leaving the functions of the executive with public opinion, “the queen of the world.” This division I have never seen in any essay or plan for a congress or diet of independent nations, either ancient or modern; and I believe it will obviate all the objections which have been heretofore made to such a plan.<sup>63</sup>

Ladd’s proposal that international organization be divided into legislative, judicial, and executive branches was, of course, a logical step to be taken by an American familiar with the comparable provision for separation of powers in the United States Constitution. Such an analysis was also a reflection of the wide-spread emergence in nineteenth century Europe and America of both treaty-making conferences and *ad hoc* courts of arbitration. The progressive development of international arbitration, a genuinely encouraging course of international practice, had begun in 1794 with the Jay Treaty, an agreement concluded by the governments of the United States and the United Kingdom as a means for resolving the many disputes still remaining after Britain’s formal acknowledgment of American independence in 1783.<sup>64</sup>

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<sup>62</sup> WILLIAM LADD, AN ESSAY ON A CONGRESS OF NATIONS FOR THE ADJUSTMENT OF INTERNATIONAL DISPUTES WITHOUT RESORT TO ARMS, at xlix (Carnegie ed., Oxford Univ. Press 1916) (1840) [hereinafter LADD]. There had been similar essay competitions organized by peace societies in France (1824), Switzerland (1830 and 1834), and England (1838), but none generated specific plans like the American. BEALES, *supra* note 40, at 61-62.

<sup>63</sup> LADD, *supra* note 62, at xlix-1.

<sup>64</sup> A.D. MCNAIR, LORD MCNAIR: SELECTED PAPERS AND BIBLIOGRAPHY 198 (1974); Hans-Jürgen Schlochauer, *Arbitration* in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 13, 14 (Bernhardt, 1981).

The Jay Treaty generated a surprising number of arbitral awards: some 536 between 1799 and 1804.<sup>65</sup> John Bassett Moore, more than a century later, identified the Jay Treaty as the turning-point in international arbitration's fortunes, noting that though the judicial settlement of international disputes was an ancient device, the seventeenth and eighteenth centuries with their religious, "dynastic, territorial and commercial contests" provided "little opportunity for arbitration."<sup>66</sup> The first of the Jay Treaty arbitrations, the St. Croix River Arbitration, marked in his opinion, "the revival in modern times of the practice of international arbitration, which religious, colonial, and commercial struggles had so long held in suspense."<sup>67</sup>

Despite the progress of the times, Ladd still deserves to be reckoned a visionary. His proposed international court went much further than international arbitration had gone before. Ladd recognized that no one kind of government was best for all nations — "the different features of all these forms of government are variously combined in infinite diversity, according to the genius of the people governed"<sup>68</sup> — but he gave a form of government that promoted an independent judiciary a special paean and suggested such a court for the community of nations. This certainly had an American flavor:

In many governments, the legislative has been entirely separated from the judicial power, and the executive from both. In all of them, the impartiality of the judicial power has been in a ratio equal to the knowledge and virtue of the people. In some of these governments, laws have been made, not only for securing the rights of private individuals, but also of bodies corporate, and even of component parts of the empire which are for many purposes independent. No such thing has yet been done with respect to nations, though courts have been instituted, to decide controversies which have arisen between two or more members of the same confederacy of nations. Our object is to go one step further, and appoint a court, by which contests between nations shall be settled, without resort to arms, when any

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<sup>65</sup> ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 128-129 (rev. ed. 1954) [hereinafter NUSSBAUM].

<sup>66</sup> John Bassett Moore, *General Introduction to 1 INTERNATIONAL ADJUDICATIONS: ANCIENT AND MODERN*, at vii, x (J.B. Moore ed., Modern Series, 1929) [hereinafter cited as Moore]. There were thousands of recorded international arbitrations in the Middle Ages. For the multitude touching on the Netherlands alone, see J.H.W. VERZIJL, *1 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 400-434 (1968). Verzijl was "driven to despair" by their number. *Id.* at 407.

<sup>67</sup> John Bassett Moore, *Preface to Saint Croix River Arbitration in Moore*, *supra* note 66, at xcv.

<sup>68</sup> LADD, *supra* note 62, at 3.

such controversy shall be brought, by mutual consent, before it.<sup>69</sup>

Ladd considered it a given that “the same moral laws which ought to govern individuals, ought to govern nations.”<sup>70</sup> When wrongs were done to nations, war ought to be avoided either (1) “by cultivating a spirit of peace, which is the spirit of the gospel” and overlooking the injury or appealing “to the moral sense” of the injuring nation; (2) by negotiation and compromise; or (3) by mediation or arbitration and acceptance of the award.<sup>71</sup> Even better would be a court:

As government is an ordinance of God, necessary for the safety, happiness and improvement of the human race, and as it is absolutely necessary for the peace of society, that when the selfish passions of man come in conflict, the judgment of the case should not be left with the individuals concerned, but with some impartial tribunal; so it is equally necessary, for the peace and happiness of mankind, that when the selfish passions of *nations* come into conflict, the decision of the case should not be left with an individual nation concerned, but should be referred to some great tribunal, that should give a verdict on the affairs of nations, in the same manner that a civil court decides the disputes of individuals.<sup>72</sup>

Ladd recognized two difficulties: the “first of these is the want of a body of men to enact and promulgate laws for the government of nations; the other is the want of a physical force to carry the decisions of a court of nations into execution.”<sup>73</sup> The legislative problem Ladd solved with his Congress of Nations.<sup>74</sup> The second he granted was more troublesome, but the trouble was much less “if we look into the condition of man in a state of civilization, [where] it will be found, that where one man obeys the laws for fear of the sword of the magistrate, an hundred obey them through fear of public opinion.”<sup>75</sup> So, for a Court of Nations,

“[t]hough at the commencement of this system, its success may not be so great as is desirable, yet, as moral power is every day

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<sup>69</sup> *Id.* at 3-4.

<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 5-6.

<sup>75</sup> *Id.* at 6.

increasing in a geometrical ratio, it will finally take the place of all wars between civilized and Christian nations, much in the same manner as a civil court has taken the place of the judicial combat.”<sup>76</sup>

Ladd’s *Essay* was not only an ethical aspiration. It had practical value. In 1872, Elihu Burritt, characterized Ladd as “the Apostle of Peace,” and termed his *Essay*’s High Court of Nations “the noblest and loftiest bar that could be established on earth.”<sup>77</sup> In 1916, James Brown Scott called Ladd’s *Essay* his “abiding title to fame.”<sup>78</sup> In 1935, in a dispassionate and “scientific” study, Georg Schwarzenberger decided that there was “a direct line” in the history of ideas about international organization “from Ladd to the achievements of Geneva [the *Alabama* arbitration explored below], and even further, on the foundations of his Equity Tribunal, to a real League of Nations.”<sup>79</sup> Ladd and his predecessors had, like Kent before them, made an ethical contribution to the development of international law.

#### IV. ELIHU BURRITT AND THE ORIGINS OF THE INTERNATIONAL PEACE MOVEMENT

By the 1840’s, the American movement for the peaceful reign of international law had already stepped from the individual speculations of Dodge and Worcester, to the peace societies in New York, Massachusetts, and other states, and even further to William Ladd, the projects in his *Essay*, and the nation-wide American Peace Society. The logical next step for the American movement was agitation and organization for an international crusade for peace and justice. The person, more than any other, who took that next step was “the learned blacksmith,” Elihu Burritt (1810-1879). Burritt came to be known as the “symbol of the international peace movement of the mid-nineteenth century,” yet another American ethical contribution to the real world of international law.<sup>80</sup>

Before he became an advocate for world peace, Burritt was already celebrated in America and England as a gifted linguist who spoke fifty languages.<sup>81</sup> His linguistic achievements were all the more remarkable because Burritt had been born poor, the third of ten children of a New Britain, Connecti-

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<sup>76</sup> *Id.* at 7.

<sup>77</sup> Scott, *supra* note 51, at iii.

<sup>78</sup> *Id.* at viii.

<sup>79</sup> GEORG SCHWARZENBERGER & WILLIAM LADD: AN EXAMINATION OF AN AMERICAN PROPOSAL FOR AN INTERNATIONAL EQUITY TRIBUNAL 7, 37 (1935).

<sup>80</sup> P. TOLIS, ELIHU BURRITT: CRUSADER FOR BROTHERHOOD 1 (1968).

<sup>81</sup> THE INQUIRER (London), No. 41 at 227-228 (April 15, 1843). The figure may have been inflated. Tolis, one of Burritt’s biographers, opines that “the number of languages he could read (he spoke more of them) was closer to thirty than fifty,” though admitting that even this was “no mean accomplishment.” TOLIS, *supra* note 80, at 16-17.

cut family who could provide their son with little formal schooling. Apprenticed at sixteen to a blacksmith, Burritt began to study Latin and Greek in his spare time. By his early twenties he had broadened his interests to French, Spanish, Italian, German, and Hebrew. In 1837, at age twenty-seven, Burritt set off on foot to Boston hoping to sail his way to distant parts to acquire more languages. On the way he stopped in Worcester, Massachusetts, where he found that the American Antiquarian Society Library there would lend him foreign grammars. He stayed in Worcester, working as a blacksmith, adding to his tongues and beginning to work as a translator.

It was in Worcester in 1840, the same year as Ladd's *Essay*, that Burritt was discovered by Massachusetts Governor Edward Everett who publicized Burritt's achievements and introduced him to Longfellow. Longfellow suggested that Burritt work at Harvard, but Burritt chose instead to take to the profitable lecture circuit, where he extolled in a very personal way self-culture and the self-made-man, topics already made popular by William Ellery Channing.<sup>82</sup>

Burritt, it seems, came to the idea of world peace by his own contemplations. Up until 1843, while still in Worcester, Burritt was more or less unaware of the active peace movement in nearby Hartford or Boston. Only in preparing a lecture on the earth's anatomy did he become persuaded that the interdependency of the different parts of the globe made a strong argument against war. He lectured on this topic at the Tremont Theater in Boston and, speaking to an audience that included some peace advocates, was recruited to the cause of peace. Back in Worcester, Burritt inaugurated a weekly newspaper, the *Christian Citizen* and, later in Worcester and then in England alongside the Quaker, Edmund Fry, established a paper, *The Bond of Universal Brotherhood*.<sup>83</sup>

Burritt threw his enthusiasm and considerable organizational talent into a peace movement already taking on an international, or at least Anglo-American, character. In 1841, the Boston Convention of the Friends of Peace had resolved to call an international peace conference. That meeting, the First Universal Peace Convention, was held in June 1843. The venue was London where it was hoped delegates could attend from all over. However, though there were 292 delegates from the United Kingdom and 26 from the United States, only six from all the nations of the Continent.<sup>84</sup> This was all too typical. Despite missionary work on the Continent, the American and London Peace Societies were unable to foster any European peace societies before the 1860's except for ones in France and Switzerland.<sup>85</sup>

The Anglo-American nature of the 19<sup>th</sup> century peace movement may explain why a European, the Dutch scholar, P.H. Kooijmans, perhaps looking

<sup>82</sup> MERLE CURTI, *THE LEARNED BLACKSMITH: THE LETTERS AND JOURNALS OF ELIHU BURRITT* 1-7 (1937).; TOLIS, *supra* note 80, at 3-27; Camp, *World's First Champion of Peace*, 10 CONN. MAG. 499-602 (No. 4, 1906).

<sup>83</sup> CURTI, *supra* note 82, at 20-21 & 28; Camp, *supra* note 82, at 602-603.

<sup>84</sup> BEALES, *supra* note 40, at 66-67.

<sup>85</sup> *Id.* at 50, 54-55.

too narrowly at continental Protestantism, insisted that Protestantism after the time of Grotius had made little impact on the development of international law:

[I]n the centuries following the Reformation Protestantism became rather inward looking, emphasizing theological issues and seemingly forgetful to the fact that the Gospel, according to the teachings of the early Reformers, had its impact on all spheres of life, including that of the relations between states. And this element also contributed to the fact that Protestant churches seldom raised their voice against the policy of their national government, however illegal or improper or plainly wicked this policy may have been. And in this sense it must be said that Protestantism as such has made hardly any contribution to the rule of law in this world in past centuries, although many Protestants have struggled heroically against evil forces.<sup>86</sup>

A similar continental expression was expressed by our favorite antagonist, Martti Koskenniemi, who dismissed the “peace societies and federalist and pacifist movements with their strongest base within the Anglo-American world” as “incompatible with an attempt to conceptualize the post-Napoleonic system in terms of legal rules. . . .”<sup>87</sup> This seems so wide of the mark that one suspects that continental civil lawyers, then as now, have trouble with common law moralizing. Kooijmans and Koskenniemi seem to take comfort in drawing a black line between the “science” of law and the “emotions” of morality and religion, a line often and cheerfully crossed by Americans.

Whatever the cause, the First Universal Peace Conference of 1843 was, indeed, really more “Anglo-American” than truly “Universal.” Despite, or because of, its heavily British contingent, the Conference took a strong stand against British imperialism, unanimously resolving, e.g.:

[t]hat the recent wars in China, Afghanistan, and now on the Ameers of Scinde, are, in the opinion of this Convention, gross violations of all equitable Christian principles, and directly calculated to prejudice the reception of evangelical truth in heathen nations, as well as to depreciate the character and influence of the British people throughout the whole civilized world.<sup>88</sup>

In May 1846, Burritt left America for England. Expecting to stay in Britain for four months, Burritt remained for four years. Early on, in July 1846,

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<sup>86</sup> P.H. Kooijmans, *Protestantism and the Development of International Law*, 152 HAGUE RECUEIL 79, 109 (1976).

<sup>87</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, 35 (2002).

<sup>88</sup> *THE INQUIRER* (London), No. 51, at 395-396 (Jun. 24, 1843).

he founded The League of Universal Brotherhood. Key to Burritt's League, and one of the earliest distinctively American commitments to an international law of human rights, was a pledge by each member to a "bond" promising to elevate "man, as a being, as a brother, irrespective of his country, color, character, or condition" and never to enlist in the armed forces or support any war. By the end of Burritt's stay in England in 1850, the League had come to number about 25,000 Americans and a like number of Britons, but, despite much effort, only a few Germans and Dutch.<sup>89</sup>

Burritt's most remarkable contributions were made as a propagandist able to reach a broad public with his ideas about peace and justice.<sup>90</sup> His immediate objective in the late 1840's was to damp the sparks of international conflict that could inflame countries to war. In speeches, pamphlets, and newspapers Burritt argued not only against war between England and America over Oregon, but also against the Mexican-American War and the possibility of war between England and France.<sup>91</sup>

Burritt went to Paris in August 1848 to organize a new peace conference, but the July revolution made the city an unhappy venue.<sup>92</sup> Burritt was much discouraged by the evidences of Revolution all around him:

The quais on both sides of the Seine from the Tuileries as far as the eye could search were crowded by the National Guards, nearly 100,000 of whom were out, marching through the city, singing the Marseillaise and crying "A bas la Communisme! Vive La Republique," & c. This demonstration was called out to oppose one of the multitude directed against the government. It appears that the Communists are inciting the people on to demand and procure a division of property, or a general confiscation in favour of the multitude; and that this military manifestation was to overawe them. Never did I witness such a scene. The Marseillaise was sung by thousands of the National Guard as they marched with their glittering bayonets through the city. It was the last sound I heard when I had retired to rest.<sup>93</sup>

Unable to hold the Peace Conference in Paris, Burritt turned instead to Brussels where his Popular International Peace Congress opened on September 20, 1848. Burritt addressed the meeting on the need for a Congress and a Court of Nations, a project that he acknowledged he had inherited from William Ladd.<sup>94</sup>

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<sup>89</sup> CURTI, *supra* note 82, at 29-32; Camp, *supra* note 82, at 603; BEALES, *supra* note 40, at 73.

<sup>90</sup> TOLIS, *supra* note 80, at 132.

<sup>91</sup> CURTI, *supra* note 82, at 28-32.

<sup>92</sup> BEALES, *supra* note 40, at 76; CURTI, *supra* note 82, at 38.

<sup>93</sup> CURTI, *supra* note 82, at 51-52 (entry of April 16, 1848).

<sup>94</sup> Camp, *supra* note 82, at 603; CURTI, *supra* note 82, at 37-39.

Paris made up for 1848 by hosting in 1849 what may have been “the most stupendous of the whole series” of international peace conferences.<sup>95</sup> Victor Hugo delivered the inaugural address:

A day will come when the only battlefield will be the market opened to commerce, and the mind opening to new ideas. A day will come when bullets and bombshells will be replaced by votes, by the universal suffrage of nations, by the venerable arbitration of a great sovereign senate, which will be to Europe what the Parliament is to England, what the Diet is to Germany, what the Legislative Assembly is to France!<sup>96</sup>

The 1849 Paris Conference welcomed more than 600 delegates, this time many from outside England and America. It marked the moment when the peace movement moved from its Anglo-American religious foundations to take on an international character.<sup>97</sup> Third and Fourth Peace Conferences followed in Frankfurt in 1850 and in London in 1851. Burritt organized mass meetings in England and the Continent and did what he could to moderate the difficulties involving Austria and Denmark over Schleswig-Holstein and the great powers in the Crimea.<sup>98</sup>

Burritt lobbied tirelessly and at remarkably high levels for his peace proposals. In 1849, he urged on Alexis de Tocqueville, then the French Foreign Minister, the cause of peace. The famous author of *Democracy in America* responded favorably, but “although personally his sympathies were with all efforts to accomplish such a desirable end he feared that its attainment was far distant.”<sup>99</sup>

Much less satisfying were Burritt’s meetings with the Germans. About one interviewee, he concluded:

He seemed like most of the Germans that we have met, to have no faith in anything except brute force. The government had a mighty army at their command, and the people could do nothing until they could overpower that force. This seemed to be his idea. We tried to argue with him, showing the impotence of brute force either for the people or for Governments.<sup>100</sup>

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<sup>95</sup> BEALES, *supra* note 40, at 78.

<sup>96</sup> *Id.* at 78-79.

<sup>97</sup> *Id.*

<sup>98</sup> CURTI, *supra* note 82, at 39-41.

<sup>99</sup> *Id.* at 59-61 (entry of July 15, 1849).

<sup>100</sup> *Id.* at 62 (entry of July 19, 1850).



In 1854, Burritt even had an audience at the White House with Franklin Pierce. The American President and Burritt, it seemed, were of quite the same persuasion:

[The President] sat down by me, and commenced a lively conversation; first inquiring if I still pursued the study of languages and then entering upon the subject of peace. I was almost surprised at the force and emphasis of his declarations in reference to this question. He said no one could more fully appreciate the miseries of war than he who had witnessed them with his own eyes and taken part in its scenes. He felt for himself an intense abhorrence of the system not, only for its horrors but for its folly. It could not settle any question of controversy. The contending powers must come to negotiation or arbitration at last, after all their fighting. Why should they not then resort to this method of adjudication before resorting to arms.<sup>101</sup>

However, even as Pierce and Burritt spoke, this phase of the American movement for international courts was coming to an end. Complicating the cause of Burritt and the other peace advocates was the problem of slavery and the political battles about it that would lead to the Civil War.<sup>102</sup> It was, if you will, the tragic flaw of the early American peace movement that the crusader for world peace was often also the same person as the crusader for the abolition of slavery. Ultimately, the struggle to abolish slavery in America meant war between the States.

If slavery were unjust and wrong, what should the Christian international law advocate do about it? Were there times when violence, even war, might be justified to eradicate a great evil? As the Civil War approached, Burritt and the other Christian peace reformers lost support throughout the North as the use of force to eradicate slavery began to be seen as a necessary evil. In 1856, William Lloyd Garrison concluded, “[p]eace or war is a secondary consideration. . . . Slavery must be conquered – peaceably if we can, forcibly if we must.”<sup>103</sup>

When the Civil War engulfed the nation in April 1861, Burritt and the other American peace advocates found themselves isolated from the very public opinion in which they so believed.<sup>104</sup> In January 1862, Burritt wrote to his English friend, Edmund Fry, and complained that “war-fever” in America had cut off his revenues from peace lecturing. Burritt was despondent and even a bit fearful:

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<sup>101</sup> *Id.* at 82-83 (entry of March 24, 1854).

<sup>102</sup> Another affliction, the Crimean War, beset the English peace movement. BEALES, *supra* note 40, at 96-104.

<sup>103</sup> BEALES, *supra* note 40, at 105-106.

<sup>104</sup> *Id.* at 104-110; BROCK, *supra* note 34, at 689-712.

I am shut up at home [in New Britain, Connecticut] at present and shall probably take my stand at the anvil again in the afternoon of each day, writing in the mornings. . . I have been writing a long lecture on a Plan of Adjustment and Reunion . . . I am doubtful whether I can get a hearing for it, and whether it will not expose me to arrest if I do deliver it anywhere . . . [O]ur Government regards it almost open treason to speak of separation or disunion.<sup>105</sup>

After the Civil War, however, American peace advocacy returned stronger than ever. Many Americans thought that war's days might well be numbered. The great codifier, David Dudley Field, remarked at the 1876 Centennial Celebration in Philadelphia:

The history of international law since July 4, 1776, shows that, notwithstanding the prevalence of almost universal war during the last quarter of the past century and the first fifteen years of the present, there has been a general tendency of the nations to approach each other more closely, to avoid war as much as possible, and to diminish its severity, when it occurs.<sup>106</sup>

Similarly, in 1910, John W. Foster, Benjamin Harrison's Secretary of State and grandfather of Dwight Eisenhower's Secretary of State, John Foster Dulles, opined that all three of America's 19<sup>th</sup> century foreign wars – the War of 1812, the 1846 Mexican War, and the 1898 Spanish-American War – could have been avoided if the disputes precipitating them had “been submitted to arbitration and decided without recourse to war.”<sup>107</sup>

Foster's admonition seemed not to be mere pipe-dreaming. International arbitration had had a remarkable 19<sup>th</sup> century American story. Beginning with the 536 awards of the Jay Treaty arbitrations between 1799 and 1804, mentioned above,<sup>108</sup> there had been hundreds of international arbitrations, many involving the United States.<sup>109</sup> America was a party to the establishment of international arbitral tribunals along the lines of those introduced in the Jay Treaty

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<sup>105</sup> Letter from Elihu Burritt to Edmund Fry (Jan. 22, 1862) (on file with author).

<sup>106</sup> David Dudley Field, *American Contributions to International Law*, 14 ALBANY L.J. 257, 258 (1876).

<sup>107</sup> Foster, *Were the Questions Involved in the Foreign Wars of the United States of Such a Nature that They Could Have Been Submitted to Arbitration of Settled Without Recourse to War?*, PROCEEDINGS OF INTERNATIONAL CONFERENCE UNDER THE AUSPICES OF AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: DECEMBER 15-17, 1910 44-68 (1912).

<sup>108</sup> NUSSBAUM, *supra* note 65, at 128-129.

<sup>109</sup> A.M. STUYT, *SURVEY OF INTERNATIONAL ARBITRATIONS: 1794-1970* 1-326 (1972) (recording 317 arbitrations from the Jay Treaty to the outbreak of World War I); RAYMOND LESLIE BUELL, *INTERNATIONAL RELATIONS* 606-607 (2d rev. ed., H. Holt ed.) (1929).

with Ecuador, Mexico, Peru, Spain, and Venezuela. The busiest of these, the United States - Mexican Mixed Claims Commission of 1868, heard more than 2,000 claims between 1871 and 1876.<sup>110</sup> As Foster noted in a little book in 1904, “[t]he nineteenth century was more fruitful than any similar era in the submission to the adjudication of special arbitration tribunals of the differences of nations insolvable by diplomatic methods.”<sup>111</sup>

Most important of all was the judgment of the *Alabama* arbitral tribunal, probably the most influential event of 19<sup>th</sup> century American international law. Delivered in 1872, the *Alabama* judgment was the work of an *ad hoc* tribunal composed of five judges named by each of the United States, Great Britain, Italy, Switzerland, and Brazil. It had been empowered by Great Britain and the United States to decide whether Britain had violated international law when it permitted British companies to build warships for the Confederacy during the American Civil War.

The *Alabama* tribunal ruled that Britain had owed the United States a duty of “active due diligence” to prevent private parties from supplying the southern rebels but had failed to observe her international obligations as a neutral state.<sup>112</sup> In relevant part, the judgment read:

And whereas, with respect to the vessel called the *Alabama*, it clearly results from all the facts relative to the construction of the ship, at first designated by the number ‘290,’ in the port of Liverpool, and its equipment and armament in the vicinity of Terceira, through the agency of the vessels called the *Agrippina* and the *Bahama*, dispatched from Great Britain to that end, that the British Government failed to use due diligence in the performance of its neutral obligations, and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number ‘290,’ to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

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<sup>110</sup> NUSSBAUM, *supra* note 65, at 213.

<sup>111</sup> JOHN W. FOSTER, *ARBITRATION AND THE HAGUE COURT* 9 (1904).

<sup>112</sup> Horst Blomeyer-Bartenstein, “*Due Diligence*,” in 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 138, 139 (R. Bernhardt ed., Elsevier Science 1987).

And whereas, in despite of the violations of the neutrality of Great Britain, committed by the '290,' this same vessel, later known as the Confederate cruiser *Alabama*, was on several occasions freely admitted into the ports of the colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

And whereas the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed;

Four of the arbitrators for the reasons above assigned, and the fifth, for reasons separately assigned by him, are of opinion that Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules, established by the sixth article of the treaty of Washington.<sup>113</sup>

The United States claimed about \$21 million in direct and \$4 million in indirect damages caused by the attacks of the *Alabama* and her sister Confederate raiders; the United Kingdom acknowledged only about \$8 million in direct damages.<sup>114</sup> The arbitrators split the difference, ordering the United Kingdom to pay the United States some \$15,500,000.<sup>115</sup> The full sum was proffered in British Treasury Bonds on September 9, 1873. The American receipt was framed and hung in 10 Downing Street.<sup>116</sup>

The *Alabama* arbitration was an exceptionally encouraging development for American international law enthusiasts. Some years earlier, in 1865, Lord Russell, the British Foreign Secretary, had refused to arbitrate the *Alabama* claims on the grounds that the British government were "sole guardians of their own honor."<sup>117</sup> The eventual success of the *Alabama* arbitration became the most important popular demonstration of the period that it was possible for powerful states to arbitrate important disputes and thereby avoid war. General Ulysses S. Grant (1822-1885), President of the United States during the *Alabama* arbitration, was so encouraged by the tribunal's deeds that the old warrior

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<sup>113</sup> *The "Alabama" Claims and Award*, 1872, CASES ON INTERNATIONAL LAW 713, 716-717 (Scott ed. 1906).

<sup>114</sup> 4 U.S. DEPARTMENT OF STATE PAPERS RELATING TO THE TREATY OF WASHINGTON -- GENEVA ARBITRATION 41-42 (1872).

<sup>115</sup> W.W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 1023, 1023-1027 (3d ed. 1971).

<sup>116</sup> J.G. WETTER, 1 THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE 170-171 (1979).

<sup>117</sup> C.C. HYDE, 2 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 120 (1922).

predicted “an epoch when a court recognized by all nations will settle international differences instead of keeping large standing armies.”<sup>118</sup> David Dudley Field turned to the *Alabama* proceedings to demonstrate the probability of the eventual success of international arbitration.<sup>119</sup>

We left Burritt in 1862, when, fearful that his antiwar protests made him unpopular in Connecticut, he felt forced to quiet his pleas to arbitrate the Civil War. In 1863, Burritt left America for England, where he trekked around the countryside and wrote two books about his rambles. Later, he served (1865-1869) as U.S. Consul in Birmingham, promoting *inter alia* assisted emigration to the United States.<sup>120</sup>

In 1870, Burritt finally returned to the United States after seven years in England. Immediately, he joined the American Peace Society and Field in calling for a new international conference. Indeed, it seems that the idea for a new peace congress sprang from a meeting between Burritt and the Secretary of the American Peace Society, Rev. James B. Miles, in 1870, when both were stranded by a storm in New Bedford, Massachusetts.<sup>121</sup> Though Burritt’s health did not permit him to cross the Atlantic again, Miles went to Europe to promote the scheme. The European response being favorable, Americans gathered at Field’s house in New York on May 15, 1873. They resolved to organize a Congress in Brussels in October and to constitute an International Code Committee in the United States to muster American support.<sup>122</sup>

These resolutions led directly to the establishment, also in 1873, of the Association for the Reform and Codification of the Law of Nations, an organization now known as the International Law Association. Unlike the continent’s Institut de Droit International, founded the same year but academically-oriented, the Association for the Reform and Codification of the Law of Nations in typical American fashion welcomed “to its membership, not only lawyers, but shipowners, underwriters, merchants, and philanthropists, and received delegates from affiliated bodies, such as Chambers of Commerce and Shipping, and Arbitration or Peace Sections, thus admitting all who are interested in the improvement of international relations.”<sup>123</sup>

The International Law Association was, in its own words, “the child of Burritt”:

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<sup>118</sup> CALVIN DEARMOND DAVIS, *THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE* 13-14 (1962).

<sup>119</sup> David Dudley Field, *International Law*, 8 ALBANY L.J. 277, 279 (1873).

<sup>120</sup> CURTI, *supra* note 82, at 150-151.

<sup>121</sup> *Id.* at 152.

<sup>122</sup> Kurt H. Nadelmann, *International Law at America’s Centennial: The International Code Committee’s Centennial Celebration and the Centenary of Field’s International Code*, 70 AM. J. INT’L L. 519, 522-523 (1976).

<sup>123</sup> INTERNATIONAL LAW ASSOCIATION, *REPORT OF THE FIRST CONFERENCE, HELD AT BRUSSELS, 1873, AND OF THE SECOND CONFERENCE, HELD AT GENEVA, 1874*, at v (1903).

[T]he idea which led to the formation of our Association emanated from America. It appears to have had its inception in the fertile brain of that far-sighted worker for peace, Elihu Burritt, "the learned blacksmith."<sup>124</sup>

Burritt's ethical commitment, alongside his tireless promotion, had led to the world's first permanent international organization devoted to international peace.

#### V. WOODROW WILSON AND THE FIGHT FOR THE LEAGUE OF NATIONS

America's great expectations for an ethical international law reached their apogee in the early 20<sup>th</sup> century. However, on June 28, 1914, Archduke Franz Ferdinand, the heir to the throne of Austro-Hungary, and his pregnant wife, the Archduchess Sofia, visited Sarajevo, the capital of Bosnia, then part of the Austro-Hungarian Empire. On the way from the railroad station to a reception at town hall, their car was hit by a grenade thrown by Serbian nationalists. Though the Archduke and Archduchess were unhurt, frightened officials urged the couple to leave Sarajevo as quickly as possible. On their way out of the city, at a bridge where their car needed to slow down, the couple were attacked again. This time one of the Serbs, Gavrilo Princip, armed with a handgun, assassinated first the Archduchess and then the Archduke.

Austria-Hungary, in the words of Barbara Tuchman, "with the bellicose frivolity of senile empires, determined to use the occasion to absorb Serbia as she had absorbed Bosnia and Herzegovina in 1909."<sup>125</sup> On July 23, 1914, Austria gave a 48-hour ultimatum to the Serbian government, which was accused of aiding and abetting the terrorist group, Black Hand, that organized the assassinations. When Serbia refused to fully comply with the ultimatum, Austro-Hungary declared war on Serbia. Russia mobilized troops to support Serbia. Germany, an ally of Austro-Hungary, declared war on Russia, and, en route to attacking France, invaded Luxembourg and Belgium. France and Britain took arms to defend Russia and Belgium. Arbitration, as urged by U.S. Secretary of State, William Jennings Bryan, "failed entirely."<sup>126</sup> The Great War began. Eight million lives were lost.

The effect of World War I on the American tradition of international law was overwhelming. Watching "civilized" Europe slip into such a dreadful loss of life and treasure for so little good reason astonished Americans who cared deeply about a better world. The nineteenth century tradition of American international law, including the contributions of Kent, Dodge, Worcester, Ladd, and Burritt, served as the foundation on which Americans, beginning in 1914,

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<sup>124</sup> *Id.* at iv-v.

<sup>125</sup> BARBARA W. TUCHMAN, *THE GUNS OF AUGUST* 71 (Ballantine ed., 1994) (1962).

<sup>126</sup> NUSSBAUM, *supra* note 65, at 224.

began to build new institutions for an ethical international law. As Europe's armies began to kill millions, it was plain that though the promise of international law in the nineteenth century had not been kept; it had become all the more necessary to fulfill that promise as soon as possible.

First and foremost among Americans shocked by the Great War was President Woodrow Wilson. Wilson must be acknowledged as the key American international law intellectual of his time, turning America from its bright optimism about international law to a darker more challenging view of the discipline. Such a transition was, of course, a matter of some urgency. It was for Wilson and his compatriots in the era of the two "Great" and terrible world wars, 1914-1945, to try, as best they could, to pick up what were, by then, shattered pieces of the discipline and, reassembling some bits and adding others, struggle to create forms of international law that would somehow be meaningful and effective in an awful period of ideological and military tumult.

Although no one would gainsay the nineteenth century American international lawyers their tremendous influence, Wilson ranks ahead of any of them in terms of practical and philosophical impact. He was, after all, for eight years, 1913-1921, President of the United States. Moreover, Wilson was America's only President whose previous career was, by and large, academic. Dauntingly for any commentator, Wilson's recorded intellectual product is matched by few, if any, other Presidents (Thomas Jefferson, James Madison, Abraham Lincoln?). Wilson was, it seems, always generating books, articles, speeches, and letters. Garry Wills argues that, for Wilson, writing, not academia, came first in order of priorities; he "took academic jobs to support his writing."<sup>127</sup> Even when Governor of New Jersey and President of the United States, Wilson, unlike most political leaders, could and did write copiously on his own. Wilson seemed to be engaged in creative written expression much of the time, making the available material penned by him impressively voluminous. I can only trace a little of his intellectual story *vis à vis* international law.

Though Wilson long had an interest in international law, he was not at first fascinated by it. Wilson's personal encounter with international law has, I think, three phases: international law began as an academic side-line; developed into a matter of deep concern; and eventually became a passion. These phases are not, of course, water-tight categories. There was slippage amongst them. However, I think they accurately reflect the course of Wilson's engagement with international law. Though we mostly remember Wilson's third idealistic phase and many today refer to some visions of international law and international relations as being "Wilsonian," Wilson in his first two phases was not himself really what we now call a "Wilsonian," but something else.

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<sup>127</sup> Garry Wills, *The Presbyterian Nietzsche*, N.Y. REV. OF BOOKS, Jan. 16, 1992, at 3. "As a young professor, Wilson wrote a prodigious amount, almost all of it frankly inspirational and aimed at the widest public. His five-volume *History of the American People* was composed in the 1890s in the form of lavishly illustrated articles for Harper's. He was paid \$1,000 for each article, an unheard-of price at the time." *Id.*

In his first phase, a mostly academic period, 1865-1913, Wilson dealt with international law many times but was not apparently entranced. As a Princeton professor, Wilson introduced a new course on International Law in the Spring of 1892. It was not, however, absorbing. Arthur Link's editorial notes to the Wilson Papers comment that in "[f]requent references in his letters to his wife ... indicate that Wilson was struggling to stay ahead of his classes." More important than international law to Wilson was Jurisprudence, where Link submits "Wilson worked hardest."<sup>128</sup> Despite this, Wilson in the 1891-1892 Princeton catalogue promised to offer International Law every other year, alternating it with his course on Constitutional Law.<sup>129</sup> It seems though that this academic promise to teach international lasted only three years until 1894.<sup>130</sup>

Wilson's relative lack of interest in international law was shown in his popular college textbook, *The State*, first published in 1892. Wilson rejected the claim of international law to be real law. "International law is, therefore, not law at all in the strict sense of the term. It is not, as a whole, the will of any state: there is no authority set above the nations whose command it is."<sup>131</sup> At best, international law was "simply the body of rules, developed out of the common moral judgements of the race, which *ought* to govern nations in their dealings with one another."<sup>132</sup>

Such a limited vision of international law was conveyed, it appears, in Wilson's lectures on Jurisprudence at Princeton. In one student's notes from 1897, for example, Wilson is recorded to have told his class that "[t]he law which is produced by the society of the States and which we call International Law ... is in part a body [of] Positive Morality, and in part a body of definite law based upon contract, treaty and the laws of individual states."<sup>133</sup> Two years later in 1898, Wilson is quoted as saying that "[t]here is no gov[ernment] to stand behind international law;" instead, international law is "addressed to the conscience and good faith of nations."<sup>134</sup>

Wilson, as an academic, never considered himself an international lawyer nor did others think of him as such. So, we are not much surprised that when the pre-eminent organization for American international lawyers, the American Society of International Law (the "ASIL") was instituted in 1905, the

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<sup>128</sup> 7 THE PAPERS OF WOODROW WILSON 292 (A. Link ed. 1984).

<sup>129</sup> *Id.* at 5.

<sup>130</sup> THOMAS J. KNOCK, TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER 8 (1992) [hereinafter KNOCK].

<sup>131</sup> WOODROW WILSON, THE STATE 629 (1st ed. 1892).

<sup>132</sup> *Id.*

<sup>133</sup> Woodrow Wilson, *quoted in* "Notes of James Lawson Norris on Woodrow Wilson Lectures, 1897-1899," handwritten notes, Jurisprudence Lecture VIII, Oct. 19, 1897, from the archives of the Firestone Library, Princeton University.

<sup>134</sup> Woodrow Wilson, *quoted in* "Notes of George L. Denny on Woodrow Wilson Lectures, 1899-1900," handwritten notes, Jurisprudence Lecture of Oct. 10, 1899, from the archives of the Firestone Library, Princeton University.



well-known President of Princeton University, Thomas Woodrow Wilson, was not there among the founders. And when, in 1907, the ASIL published the first volume of what would quickly become America's premier international law review, *The American Journal of International Law* (the "AJIL"), Wilson, again, was nowhere to be found. Given his later importance to the field, one might have expected Wilson to have been among America's international law great, good and learned in the pages of the AJIL in 1907. He would have been in excellent company. To mention only a dozen of the more prominent figures who, unlike Wilson, did publish in the first four issues of the AJIL, there were: Elihu Root, the U.S. Secretary of State;<sup>135</sup> John W. Foster, formerly U.S. Secretary of State and grandfather of a later U.S. Secretary of State, John Foster Dulles;<sup>136</sup> John Bassett Moore, Professor of International Law at Columbia University;<sup>137</sup> George B. Davis, Judge Advocate General of the U.S. Army;<sup>138</sup> Amos S. Hershey, Professor of International Law at the University of Indiana;<sup>139</sup> Jacob B. Hollander, Professor of Political Economy at Johns Hopkins University;<sup>140</sup> Robert Lansing, who would become Woodrow Wilson's second Secretary of State;<sup>141</sup> Simeon E. Baldwin, Chief Justice and later Governor of Connecticut;<sup>142</sup> Paul S. Reinsch, Professor of Political Science at the University of Wisconsin;<sup>143</sup> Albert Bushnell Hart, Professor of Government at Harvard University;<sup>144</sup> James Brown Scott, Professor of Law at George Washington University;<sup>145</sup> and Charles H. Stockton, Rear Admiral in the U.S. Navy.<sup>146</sup>

Wilson's reluctance to take international law too seriously carried over at least to his 1912 campaign for the presidency. Even when appearing before

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<sup>135</sup> Elihu Root, *The Need of Popular Understanding of International Law*, 1 AM. J. INT'L L. 1 (1907); Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT'L L. 273 (1907).

<sup>136</sup> John W. Foster, *International Responsibility to Corporate Bodies for Lives Lost by Outlawry*, 1 AM. J. INT'L L. 4 (1907).

<sup>137</sup> John Bassett Moore, *International Law: Its Present and Future*, 1 AM. J. INT'L L. 11 (1907).

<sup>138</sup> George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907); George B. Davis, *The Geneva Convention of 1906*, 1 AM. J. INT'L L. 409 (1907).

<sup>139</sup> Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26 (1907).

<sup>140</sup> Jacob B. Hollander, *The Convention of 1907 Between the United States and the Dominican Republic*, 1 AM. J. INT'L L. 287 (1907).

<sup>141</sup> Robert Lansing, *Notes on Sovereignty in a State*, 1 AM. J. INT'L L. 297 (1907).

<sup>142</sup> Simeon E. Baldwin, *The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World*, 1 AM. J. INT'L L. 565 (1907).

<sup>143</sup> Paul S. Reinsch, *International Unions and Their Administration*, 1 AM. J. INT'L L. 579 (1907).

<sup>144</sup> Albert Bushnell Hart, *American Ideals of International Relations*, 1 AM. J. INT'L L. 624 (1907).

<sup>145</sup> James Brown Scott, *The Legal Nature of International Law*, 1 AM. J. INT'L L. 831 (1907).

<sup>146</sup> C.H. Stockton, *Would Immunity from Capture, During War, of Non-Offending Private Property Upon the High Seas be in the Interest of Civilization?*, 1 AM. J. INT'L L. 930 (1907).

those well-disposed to hear good things about international law, Wilson was not inclined to much praise the discipline. In a speech to the Universal Peace Union in February 1912, Wilson was careful to caution his audience about the limits of international law and international courts. A news account reported that Wilson argued that it was important that countries achieve domestic harmony before international peace could be realistically sought:

In the first part of the address Governor Wilson said that it was necessary to carefully study the whole question and to endeavor to ascertain whether we could clearly advocate peace. He said that countries must first have industrial peace and justice within the confines of the country before the question of international peace should be discussed. He said that war was "clumsy and brutal," and that we were steadily outgrowing such methods of righting wrongs, but that all must gravely consider the question of concession and equality before war could be abolished. He characterized peace as a perfectly running machine with friction practically eliminated, due to the perfection of construction.

The whole keynote of the address was the need for righting wrongs, securing justice for the laborer, equity and right in each country and international good will would necessarily follow.<sup>147</sup>

However, When Wilson became President he began to take a very different view of international law. Perhaps to his surprise, the discipline became a necessary part of his job. In Wilson's second phase, 1913-1917, as President of the United States but before we entered the war, Wilson was suddenly deeply concerned about international law, especially violations of it.

No sooner had the European war broken out than, on August 22, 1914, Wilson's principal advisor, Colonel House, whom Wilson called "my second personality ... my independent self", advised Wilson: "Germany's success will ultimately mean trouble for us. We will have to abandon the path which you are blazing as a standard for future generations, with permanent peace as its goal and a new international ethics code as its guiding star, and build up a military machine of vast proportions."<sup>148</sup> A few months later, Wilson, echoed House in a speech to the American Bar Association, argued that, "[o]ur first thought, I suppose, as lawyers, is of international law, of those bonds of right and principle

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<sup>147</sup> Woodrow Wilson, Address to the Universal Peace Union in Philadelphia (Feb. 19, 1912), in 24 THE PAPERS OF WOODROW WILSON 181, 182 (A. Link ed.).

<sup>148</sup> RICHARD HOFSTADTER, *Woodrow Wilson: The Conservative as Liberal*, in THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 308, 340 (Vintage ed., 1974).

which draw the nations together and hold the community of the world to some standards of action.”<sup>149</sup>

Faced with attacks on trans-Atlantic shipping by German U-boats, Wilson invoked “the whole fine fabric of international law” as justification for permitting Americans, still neutrals in the combat, to travel on Allied shipping, even the ill-fated *Lusitania*, sunk in the spring of 1915. Wilson wrote Senator Stone that to do otherwise, international law “might crumble under our hands piece by piece.”<sup>150</sup>

When, on April 2, 1917, Wilson went to Congress for a declaration of war against Imperial Germany, he entered into his third and final phase of involvement with international law. Far from a subject of little interest, no longer just a matter of anxious concern, international law became, for Woodrow Wilson, a passionate involvement. Indeed, the development of international law became, for him, one of the chief justifications for the United States entering into a bloody and much regretted war.

To understand Wilson’s final passion for international law, it is necessary to comprehend his personal anguish in launching the United States into the horrors of Europe’s Great War. And to understand that anguish, it is necessary to remember Wilson’s boyhood acquaintance with an equally awful conflagration, the American Civil War. Thomas Knock captures this as well as any:

Thomas Woodrow Wilson’s earliest memory was of hearing, at the age of four, that Abraham Lincoln had been elected President and that there would soon be a war. His father, the Reverend Dr. Joseph Ruggles Wilson, was one of Georgia’s most prominent Presbyterian ministers and, despite his Yankee heritage, an ardent Southern sympathizer. Both of Wilson’s parents were Northerners; in the 1850’s, they had moved from Ohio to Staunton, Virginia (where Wilson was born in 1856), and eventually to Augusta, Georgia, where the Civil War overshadowed Wilson’s childhood. As his eighth birthday approached, he witnessed the solemn march of thousands of Confederate troops on their way to defend the city against Sherman’s invasion. He watched wounded soldiers die inside his father’s church and pondered the fate of the ragged Union prisoners confined in the churchyard outside. Soon he would see Jefferson Davis paraded under Union guard through the streets and would recall standing “for a moment at General Lee’s side and looking up into his face.

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<sup>149</sup> Woodrow Wilson, Remarks to the American Bar Association (October 20, 1914), in 31 Papers of Woodrow Wilson 184 (Link ed. 1969).

<sup>150</sup> HOFSTADTER, *supra* note 148, at 345.

Wilson once commented, "A boy never gets over his boyhood, and never can change those subtle influences which have become a part of him." It is an important fact that he experienced, at an impressionable age, the effects of a great war and its aftermath.<sup>151</sup>

The son of a Presbyterian minister and a Presbyterian minister's daughter, Wilson, in the words of Richard Hofstadter, was reared "to look upon life as the progressive fulfillment of God's will and to see man as 'a distinct moral agent' in a universe of moral imperatives."<sup>152</sup> Wilson "never aspired to be a clergyman, but he made politics his means of spreading spiritual enlightenment, of expressing the powerful Protestant urge for 'service'."<sup>153</sup> International law became Wilson's mission.

The echoes of the Civil War and the powerful Protestant sense of moral mission were plain two years after America's declaration of war when Wilson went to the U.S. Senate looking for its advice and consent to the League of Nations Covenant he had personally negotiated in Paris. He spoke of Congress's assent to sending troops to fight in France:

Let us never forget the purpose – the high purpose, the disinterested purpose – with which America lent its strength, not for its own glory but for the defense of mankind. I think there is nothing that appeals to the imagination more in the history of man than those convoyed fleets crossing the ocean with the millions of American soldiers aboard – those crusaders, those men who loved liberty enough to leave their homes and fight for them upon the distant fields of battle, those men who swung into the open as if in fulfillment of the long prophecy of American history.

What a halo and glory surrounds those old men whom we now greet with such reverence, the men who were the soldiers in our Civil War! They saved a Nation! When these youngsters grow old who have come back from the fields of France, what a halo will be around their brows! They saved the world! They are of the same stuff as those old veterans of the Civil War. I was born and bred in the South, but I can pay that tribute with all my heart to the men who saved the Union. It ought to have been saved! It was the greatest thing that men had conceived up to that time. Now we come to a greater thing – to the union of great nations in conference upon the interests of peace. That is the fruitage, the fine and appropriate fruitage of what these men

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<sup>151</sup> KNOCK, *supra* note 130, at 3.

<sup>152</sup> HOFSTADTER, *supra* note 148, at 308.

<sup>153</sup> *Id.*

achieved upon the fields of France. I do not hesitate to say, as a sober interpretation of history, that American soldiers saved the liberties of the world.

Shall the great sacrifice that we made in this war be in vain, or shall it not?<sup>154</sup>

What would justify this great sacrifice? In answering, Wilson had, three years earlier, invoked international adjudication with religious enthusiasm:

You know that there is no international tribunal, my fellow citizens. I pray God that if this contest have no other result, it will at least have the result of creating an international tribunal and producing some sort of joint guarantee of peace on the part of the great nations of the world.<sup>155</sup>

Once the war began, Wilson went further, moving from merely advocacy for an international tribunal, to the ideal of a full-fledged international government, the League of Nations:

If it be in deed and in truth the common object of the Governments associated against Germany and of the nations whom they govern, as I believe it to be, to achieve by the coming settlements a secure and lasting peace, it will be necessary that all who sit down at the peace table shall come ready and willing to pay the price, the only price, that will procure it; and ready and willing, also, to create in some virile fashion the only instrumentality by which it can be made certain that the agreements of the peace will be honored and fulfilled.

That price is impartial justice in every item of the settlement, no matter whose interest is crossed, and not only impartial justice, but also the satisfaction of the several peoples whose fortunes are dealt with. That indispensable instrumentality is a League of Nations formed under covenants that will be efficacious.<sup>156</sup>

Wilson's transformation, an all-encompassing conversion to an ideal international law, was remarkable. After years of doubt about the potential of in-

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<sup>154</sup> WOODROW WILSON'S CASE FOR THE LEAGUE OF NATIONS 20-21 (H. Foley ed., 1922) [hereinafter *Wilson's Case*].

<sup>155</sup> Woodrow Wilson, Address in Des Moines, Iowa (Feb. 1, 1916), in James Brown Scott, AN INTERNATIONAL COURT OF JUSTICE, at ii (Oxford Univ. Press 1916).

<sup>156</sup> Woodrow Wilson, Address in New York (Sept. 27, 1918), in WOODROW WILSON'S OWN STORY 284, 285 (D. Day ed. 1952).

ternational law, he had become fully committed to an extreme form of the discipline, a belief in world government. In arguing that "International Law [was] Completely Changed,"<sup>157</sup> Wilson wrote that "International law up to this time has been the most singular code of manners. You could not mention to any other government anything that concerned it unless you could prove that your own interests were involved. ... In other words, at present, we have to mind our own business."<sup>158</sup> But, once the United States joined the League of Nations, Americans would be able to "mind other people's business and everything that affects the peace of the world, whether we are parties to it or not. We can force a nation on the other side of the globe to bring to that bar of mankind any wrong that is afoot in that part of the world which is likely to affect the good understanding between nations, and we can oblige them to show cause why it should not be remedied."<sup>159</sup> This was supra-nationalism, a remarkable imposition on state sovereignty.

The apotheosis of Wilson's vision of an ethical international law came in his famous Fourteen Points speech of January 8, 1918. This eloquent elaboration of American War aims not only hastened the peace with Germany and the other central powers, but charted an ethical course for international relations. Along with Thomas Jefferson's 1776 Declaration of Independence, James Madison's 1787 United States Constitution, and Abraham Lincoln's 1863 Gettysburg Address, Woodrow Wilson's 1918 Fourteen Points ranks, I believe, as one of America's four most important public documents. It read in relevant part:

We entered this war because violations of right had occurred which touched us to the quick and made the life of our own people impossible unless they were corrected and the world secured once for all against their recurrence. What we demand in this war, therefore, is nothing peculiar to ourselves. It is that the world be made fit and safe to live in; and particularly that it be made safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, be assured of justice and fair dealing by the other peoples of the world as against force and selfish aggression. All the peoples of the world are in effect partners in this interest, and for our own part we see very clearly that unless justice be done to others it will not be done to us. The program of the world's peace, therefore, is our program; and that program, the only possible program, as we see it, is this:

And some of its most remembered proposals:

I. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view.

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<sup>157</sup> WILSON'S CASE, *supra* note 154, at 103.

<sup>158</sup> *Id.* at 103-104.

<sup>159</sup> *Id.* at 104.

II. Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

III. The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.

IV. Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety.

V. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

And most importantly:

XIV. A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.

In regard to these essential rectifications of wrong and assertions of right we feel ourselves to be intimate partners of all the governments and peoples associated together against the Imperialists. We cannot be separated in interest or divided in purpose. We stand together until the end.

For such arrangements and covenants we are willing to fight and to continue to fight until they are achieved; but only because we wish the right to prevail and desire a just and stable peace such as can be secured only by removing the chief provocations to war, which this program does not remove. We have no jealousy of German greatness, and there is nothing in this program that impairs it. We grudge her no achievement or distinction of learning or of pacific enterprise such as have made her record very bright and very enviable. We do not wish to injure her or to block in any way her legitimate influence or power. We do not wish to fight her either with arms or with hostile arrangements of trade if she is willing to associate her-

self with us and the other peace-loving nations of the world in covenants of justice and law and fair dealing. We wish her only to accept a place of equality among the peoples of the world, -- the new world in which we now live, -- instead of a place of mastery.

We have spoken now, surely, in terms too concrete to admit of any further doubt or question. An evident principle runs through the whole program I have outlined. It is the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak. Unless this principle be made its foundation no part of the structure of international justice can stand. The people of the United States could act upon no other principle; and to the vindication of this principle they are ready to devote their lives, their honor, and everything that they possess. The moral climax of this the culminating and final war for human liberty has come, and they are ready to put their own strength, their own highest purpose, their own integrity and devotion to the test.<sup>160</sup>

## VI. CONCLUSION

As I began, so I conclude. I hope I have demonstrated that there was nothing hypocritical about the commitments of these Americans – Kent, Dodge, Worcester, Ladd, Burritt, and Wilson – to an ethical international law. Their moral sentiment was, I believe, absolutely genuine. I do not deny that one could, probably, equally well tell a tale of the commitment of other Americans to a narrow practically positivistic utilitarian international law. That both strands are woven into the fabric of the American tradition of international law, I do not deny. But to those abroad who condemn us in the United States as having “no real obligation to obey international law” or as being “imperial authoritarians” or as “uncommitted to the tenets of international law,” I answer – no, it has never been all of us. Rather, many of us Americans have always stood, along with James Kent, ready and eager to uphold the ethics of Grotius. Let us finish with Kent’s words and sentiment:

[J]ustice [is] of perpetual obligation, and essential to the well being of every society, . . . [T]he great commonwealth of nations [stands] in need of law, and the observance of faith, and the practice of justice.<sup>161</sup>

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<sup>160</sup> 45 THE PAPERS OF WOODROW WILSON 536 (A. Link ed., 1984).

<sup>161</sup> KENT, AMERICAN LAW, *supra*, note 7, at 15.



